

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	<b>Civil Action No. 1:CV-04-0830</b>
	:	
<b>THE COMMONWEALTH OF</b>	:	<b>(KANE, J.)</b>
<b>PENNSYLVANIA; EDWARD G.</b>	:	
<b>RENDELL, Governor of the</b>	:	
<b>Commonwealth of Pennsylvania;</b>	:	
<b>and PEDRO A. CORTÉS, Secretary</b>	:	
<b>of the Commonwealth of</b>	:	
<b>Pennsylvania,</b>	:	
	:	
<b>Defendants.</b>	:	<b>Electronically Filed</b>

**DEFENDANT COMMONWEALTH OF PENNSYLVANIA'S RESPONSE  
TO THE UNITED STATES' MOTION FOR A TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

**INTRODUCTION**

This action was brought by the United States to enforce the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §1973ff *et seq.* (UOCAVA). Although this action was originally brought to remedy alleged UOCAVA violations in connection with Pennsylvania's Primary Election held on April 27, 2004, the United States has now filed a motion for a temporary restraining order and a preliminary injunction in connection with the general election to be held on November 2, 2004.

As the papers filed by the United States explain, the request for extraordinary relief arises from the uncertain state of the ballot regarding the candidates for President and Vice-President of the United States. As of the date the United States filed its papers, the nomination petitions of independent candidates Ralph Nader and Peter Comejo were being challenged. The matter was being litigated before the Commonwealth Court and had not been decided. *See In re: Nomination Papers of Ralph Nader and Peter Miguel Comejo*, 568 M.D. 2004 (Pa. Cmwlth. Ct.).

The alleged harm to UOCAVA protected voters<sup>1</sup> stems from the varying status of the *Nader* litigation at the times absentee ballots were being sent out by the counties. Based on information provided to the Commonwealth by the counties and shared with the United States, the vast majority of Pennsylvania's counties had, prior to August 30, 2004, mailed special write-in<sup>2</sup> or other

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<sup>1</sup> Such voters include, members of the uniformed services that are on active duty and as a result of that duty are absent from their voting residence; similarly situated members of the merchant marine; spouses and dependents of the first two categories of protected voters, who are absent from their voting residence based on the duties of the first two categories of voters; members of the uniformed services who are absent from the United States on the date of the election as a result of active duty; and civilians who reside outside the United States and are otherwise qualified to vote or would be qualified but for their residence. 42 U.S.C. §1973ff-6(5)

<sup>2</sup> The Election Code provides that "where there is not time to print on ... ballots the names of the various candidates, the county board of elections shall print special write-in absentee ballots which shall be substantially in the form of other official

appropriate ballots to military and overseas voters who had requested ballots and had those ballots approved. On August 30, 2004, the Commonwealth Court set aside the nomination papers of Ralph Nader and Peter Miguel Camejo, candidates for President and Vice President of the United States, and directed defendant Secretary of the Commonwealth not to print their names on the ballot for the 2004 General Election. *In re: Nomination Papers of Ralph Nader and Peter Miguel Camejo*, No. 568 M.D. 2004 (Order of August 30, 2004).

The Commonwealth Court's order was appealed. *See In re: Nomination Papers of Ralph Nader and Peter Miguel Camejo*, No. 154 MAP 2004 (Pa. Supreme Court). While that appeal was pending, the Secretary of the Commonwealth certified the ballot without including Nader and Camejo as candidates. On September 20, 2004, the Supreme Court reversed the Commonwealth Court's order and remanded the matter to Commonwealth Court for further proceedings regarding challenges to the signatures on Nader's and Camejo's nomination petitions. *Id.* (Order of September 20, 2004).

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absentee ballots except that such special write-in absentee ballots shall contain blank spaces only under the titles of such offices in which the electors may insert the names of the candidates for whom they desire to vote ..." Pa. Stat. Ann., tit. 25, §4146.3 (d). The county board of elections is also required to furnish voters with a list of all the candidates named in nomination petitions or who have been regularly nominated for those offices. *Id.*

In light of the Supreme Court's order, the Secretary of the Commonwealth amended the certification of the ballot on September 21, 2004 and restored Nader and Camejo to the ballot. (Pl. Br. Ex. A). The Secretary also cautioned the counties that the state of the ballot might change again depending on the ultimate ruling of the Commonwealth Court and that such a change would require sending a second accurate absentee ballot to those voters who received a ballot that did not conform with the final ballot. *Id.* Finally, the Secretary instructed the counties that while it was correct to send out absentee ballots without Nader and Camejo as candidates between August 30 and September 20, 2004, it was not appropriate to do so after the amended certification issued. *Id.*

Based on information provided to the Commonwealth by the counties and shared with the United States, it appears that from August 24 through late September, the counties sent out over 15,000 absentee ballots to military and overseas voters. Given the fluctuation in the status of the Nader and Camejo nominations during the period, it is likely that some military and overseas voters received ballots showing Nader and Camejo as candidates and others received ballots that did not.

On October 13, 2004, the Commonwealth Court ruled that Nader and Camejo did not have a sufficient number of valid signatures on their nomination

petitions to secure places on the ballot. *In re: Nomination Papers of Ralph Nader and Peter Miguel Camejo*, No. 568 M.D. 2004 (Order of October 13, 2004).

The Commonwealth has been informed that Nader and Camejo appealed on October 14, 2004 and that the Pennsylvania Supreme Court has accepted the appeal. The parties have been ordered to file briefs no later than 2:00 p.m. on October 15, 2004.

Against this backdrop the United States argues that to ensure UOCAVA protected voters an effective right to vote, corrected ballots must be sent to them within 24 hours after the ballot is finalized. The United States also contends that UOCAVA protected voters must be given 30 days from the time the corrected ballots go out, to receive, vote and return those ballots, regardless of the state law deadline for receipt of those ballots.<sup>3</sup>

In addition to seeking the relief described above, the United States asks this Court to order that corrected ballots received from overseas voters by facsimile transmission or electronic mail, be accepted and counted, that procedures be established whereby ballots may be returned by such means, that notice of the relief afforded by this Court be provided by direct mail and through the media, and

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<sup>3</sup> Generally, the deadline for receipt of absentee ballots is 5:00 p.m. on October 29, 2004. Pa. Stat. Ann. tit. 25, §3146.8 (Purdon's Supp. 2003). Votes in the Presidential race will be counted if received by the close of the polls on election day, or by 8:00 p.m. on November 2, 2004. 42 U.S.C. §1973aa-1(d).

that a report be provided to the Court regarding the number of ballots received by UOCAVA protected voters.

The Court requested defendants to respond to the United States' motion in an expedited fashion and scheduled a hearing in this matter on October 19, 2004 (Order of October 13, 2004). The Commonwealth<sup>4</sup>, through its Attorney General, submits this response to the motion of the United States.

## ARGUMENT

### **I. STANDARDS FOR GRANTING A PRELIMINARY INJUNCTION**

The decision to grant or deny preliminary relief is vested in the sound discretion of the Court. *National Steel Car, Ltd. v. Canadian Pacific Ry.*, 357 F.3d 1319, 1325 (3d Cir. 2004). In exercising that discretion, the Court must consider four factors: (1) whether the moving party has a reasonable probability of success on the merits; (2) whether irreparable harm would result if the relief were not granted; (3) whether relief would result in greater harm to the non-moving party; and, (4) whether the relief is in the public interest. *Swartzwelder v. McNeilly*, 297 F.3d 228, 234 (3d Cir. 2002).

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<sup>4</sup> Defendants Governor Edward G. Rendell and Secretary of the Commonwealth Pedro A. Cortes will file a separate response.

For the purposes of this argument the Commonwealth focuses on the last two factors. In doing so, it does not concede that the United States has or will satisfy its burden of proof as to the first two.

**II. THE COURT CANNOT MAKE THE DETERMINATIONS REQUIRED UNTIL THE NADER LITIGATION IS FINALLY RESOLVED.**

As the Court recognized in the October 12 telephone conference with counsel regarding the pending motion, it cannot determine what if any relief is appropriate until the ballot in Pennsylvania is finalized. Under present circumstances, it appears the ballot will not be final until the Pennsylvania Supreme Court rules on the Nader nomination petitions.

Until the Supreme Court rules, this Court is unable to make any definitive decisions regarding the feasibility of sending out new ballots and extending the deadline for their return. The impact of such relief on defendants and on the public interest cannot be weighed until the Court knows how these measures will affect the current election schedule and the various post-election deadlines for finalizing the count, certifying the results and identifying the electors that will cast votes in the Electoral College. The effect on the schedule and various deadline hinges on the timing of the Supreme Court's decision. Therefore, the Commonwealth urges the Court to refrain from acting until that decision issues.

**III. IF THE COURT GRANTS RELIEF IN THIS CASE IT SHOULD AT MINIMUM REQUIRE THAT NOTICE OF THE CONTENTS OF THE FINAL BALLOT BE GIVEN TO MILITARY AND OVERSEAS VOTERS .**

The Commonwealth, through its Attorney General, believes that if this Court determines that some relief is warranted, it should at minimum involve notifying UOCAVA protected voters of the contents of the final ballot. Depending on the timing of the final resolution of the *Nader* litigation, it is quite possible that some voters will not have yet voted and returned their ballots. With appropriate notification, those voters will be able to vote the ballot they have, having been fully informed of their options. If the final ballot contains Nader, voters with ballots without his name, can write him in. Under those circumstances, voters with ballots conforming to the final ballot can cast their votes knowing that Nader is an official option. On the other hand, if Nader is not on the final ballot, regardless of what ballot voters have, they can cast it having been fully informed of his status.

The Commonwealth does not reject the possibility that some additional relief in the form of issuing a corrected ballot and extending the time for UOCAVA protected voters to return it, may be appropriate. That determination must be made based on the facts and circumstances<sup>5</sup> as they exist when the Pennsylvania Supreme Court finally resolves the *Nader* litigation. The

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<sup>5</sup> The Commonwealth anticipates that the Court will be informed of these matters through the evidence presented by the United States and defendants Rendell and Cortés, at the October 19, 2004 hearing.

Commonwealth emphasizes that any such extension must be for the minimum period necessary to protect the voters' rights, must minimally burden state and county election officials in fulfilling their duties under Pennsylvania's Election Code, and must give appropriate consideration to the public interest in maintaining the integrity of the election process.

## CONCLUSION

For all of the preceding reasons, the Commonwealth, through its Attorney General, respectfully requests the Court to refrain from acting on the United States' motion until the Pennsylvania Supreme Court has finally resolved the *Nader* litigation. In addition, the Commonwealth requests that, if the Court determines relief is appropriate, that it be limited to the minimum necessary to protect the affected voters' rights and that it be tailored to minimize the burden on state and county election officials in fulfilling their duties under the state Election Code.

**Respectfully submitted,**

**GERALD J. PAPPERT**  
**Attorney General**

**By: /s/ Susan J. Forney**  
**SUSAN J. FORNEY**  
**Chief Deputy Attorney General**  
**I.D. No. 27744**

**Office of Attorney General**  
**Litigation Section**  
**15<sup>th</sup> Floor, Strawberry Square**  
**Harrisburg, PA 17120**  
**Phone: (717) 787-9831**  
**Fax: (717) 772-4526**

**DATED: October 14, 2004**

**CERTIFICATE OF SERVICE**

I, **SUSAN J. FORNEY**, Chief Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on October 14, 2004, I caused to be electronically filed and served the foregoing document entitled **Unopposed Motion for Enlargement of Time to Respond to Complaint:**

**Stephen R. Cerutti, II**  
Assistant U.S. Attorney  
U.S. ATTORNEY'S OFFICE  
228 Walnut Street, Suite 220  
Harrisburg, PA 17108

**Stephen B. Pershing, Esquire**  
Civil Rights Division-Voting Section  
U.S. DEPARTMENT OF JUSTICE  
Room 7254 – NWB  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

**Linda C. Barrett, Chief Counsel**  
Department of State  
302 North Office Building  
Harrisburg, PA 17120

**Leslie Anne Miller, General Counsel**  
**Gregory E. Dunlap**  
Deputy General Counsel  
Commonwealth of Pennsylvania  
333 Market Street, 17<sup>th</sup> Floor  
Harrisburg, PA 17120

/s/ Susan J. Forney  
**SUSAN J. FORNEY**  
Chief Deputy Attorney General  
I.D. No. 27744